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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

E. Martin

PL 2

FILE: B-189702

DATE: March 7, 1978

MATTER OF: Washington School of Psychiatry

DIGEST:

1. Contention that procurement should have been awarded on sole source basis to protester will not be considered by GAO in absence of fraud or wilful misconduct by procurement or user personnel.
2. Composition of evaluation panel is matter primarily within discretion of procuring agency. In absence of evidence of bias, there is nothing intrinsically wrong with agency using same panel which evaluated proposals for earlier phase to evaluate proposals for subsequent phase of program. Moreover, fact that agency's program monitor for protester's prior contract also served on evaluation panel did not result in conflict of interest.
3. Failure of some evaluators to document rationale for each score as required by internal agency instructions are deficiencies of form rather than substance and do not, in themselves, indicate protester's interests were prejudiced or that selection should be disturbed.
4. Where danger of technical leveling through detailed discussions exists, agency is not required to discuss all inferior aspects of otherwise technically acceptable proposals and is justified in limiting discussions to areas needing clarification.
5. Contention that lack of objective standards for evaluators necessarily results in unfair evaluations is denied where solicitation sets forth in detail definitive evaluation criteria, subcriteria and the maximum weights for each.
6. Protester who participated without objection in irregular course of action cannot be heard to complain after decision is made to award contract

to competitor that protester was improperly informed of its relative standing.

7. Propriety of technical evaluator's expression of hope to user personnel that, for sake of continuity, award would go to protester which had performed predecessor contract, is questioned because it could be construed as predisposition in evaluation process. However, such expression of hope was not factual advice.
8. Matter involving possible misappropriation of proprietary data by consultant relates to dispute between two private parties and should not be resolved by GAO.

The Washington School of Psychiatry (WSP) protests the pending contract award by the Department of Health, Education, and Welfare, (HEW) to Kirschner Associates, Inc. (Kirschner) under request for proposals (RFP) No. ASD-7-77. WSP contends that its proposal was technically superior and that other irregularities contaminated the proposal evaluation procedure.

The solicitation requested firm fixed price offers to provide technical assistance to various state agencies in establishing training programs on child abuse and neglect. The RFP stated that technical excellence would be the most significant factor in selecting the contractor, although proposals were to be fairly and reasonably priced. Technical evaluation criteria were set forth with weight factors on a scale of 100 points. Of the 9 firms solicited, 4 submitted proposals and after clarifications, the proposals of Kirschner, with a technical score of 79.3, and WSP, with a technical score of 77, were considered to be within the competitive range. Telephonic negotiations were conducted with both firms after which best and final offers were requested. HEW proposes to make award to Kirschner but is holding up the award pending resolution of this protest.

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WSP which performed the predecessor contract contends that by virtue of its general and specific experience in the field of child abuse, it is uniquely qualified and should have been awarded a contract on a sole source basis. However, in the absence of fraud or wilful misconduct by procurement or user personnel, this Office will not consider a protest based on an agency's failure to procure on a sole source basis. American Safety Flight Systems, Inc., B-189923, January 12, 1978, 78-1 CPD .

WSP also contends that the failure to include potential consumers or non-federal personnel on the evaluation panel (which consisted of three federal employees) resulted in an evaluation panel which was inherently unfair, unbalanced and unobjective. It states that all members of the panel had previously met with WSP under adverse circumstances. The record indicates this evaluation panel also reviewed the proposals in 1976 for an earlier phase of the program and that WSP received the contract. Prior to the evaluation of the instant proposals, at least two of the panel members listened to an oral report of accomplishments by WSP under the previous contract. All panel members found WSP's proposal technically acceptable for this phase of the program. In the absence of any evidence of unwarranted bias, the composition of an evaluation panel is a matter primarily within the discretion of the procuring agency. Department of Labor Day Care Parents Assoc., 54 Comp. Gen. 1035 (1975), 75-1 CPD 353. We are aware of no requirement for participation of non-federal employees in evaluation of the proposals involved here. Compare Checchi and Company, B-187982, April 4, 1977, 77-1 CPD 232. Moreover, we cannot conclude that HEW's project monitor on the previous contract should not have been designated as an evaluator for this contract because of conflict of interest. See Virgin Islands Business Association, Inc., B-186846, February 16, 1977, 77-1 CPD 114. Accordingly, we do not question the composition of the evaluation panel. Gloria G. Harris, B-188201, April 12, 1977, 77-1 CPD 255.

WSP contends that the failure of some of the evaluators to comply strictly with written instructions for completion of their score sheets should have invalidated all such score sheets. This, it states, would have resulted in WSP receiving a higher rating than Kirschner based on the remaining valid score sheets. Specifically, WSP points to instances where the score sheets contained no written rationale for a score. HEW concedes that such instances did occur. The

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written instructions state that no evaluation is acceptable if the evaluator's written rationale is missing. HEW contends, however, that the written instructions consisted of an internal HEW instructional handout and, as such, did not create or define any substantive rights of the offerors.

We agree that such instructions concern internal agency matters for the guidance of evaluators when exercising their individual judgments in rating proposals. They establish procedural goals toward which all evaluators should strive. We note that these forms provided definitive criteria for evaluating proposals and in our opinion, the documentation deficiencies here are matters of form rather than substance and do not, in themselves, indicate that WSP's interests were prejudiced or that the selection should be disturbed.

WSP states that although the RFP specified no proposal format, its proposal was downgraded for failure to follow the RFP format. The record indicates that one of the evaluators initially noted that WSP's proposal did not follow the RFP format and that it contained no real discussion of the purpose and problems posed by the RFP. The evaluation panel's report, dated July 1, 1977, to the contracting officer listed these factors as weaknesses. The scores given to each competitor were composites of the initial evaluations of each evaluator. However, the contracting officer, who was the source selection authority, made his decision only after reading the proposals as well as the panel's report. He states that he considered the format remark to be criticism of form and not of content and that the WSP proposal was poorly written. Thus, it appears that the contracting officer made his selection in accordance with the RFP and did not accept without question the panel's report.

It is the position of WSP that the agency should have provided it with an opportunity to respond to all questions raised by the evaluators so that it could have improved its competitive standing. In effect, the protester believes that the agency should have discussed each area of the WSP proposal receiving less than maximum points. However, there is no requirement to discuss all inferior aspects of an otherwise technically acceptable proposal. Whether a given inadequacy should be discussed is determined by the nature of the inadequacy and the impact that its disclosure would have

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on the competitive process. Dynalectron Corporation, B-184203, March 10, 1976, 76-1 CPD 167. In 51 Comp. Gen. 621, 622 (1972), this Office stated:

"It is also unfair, we think, to help one proposer through successive rounds of discussions to bring his original inadequate proposal up to the level of other adequate proposals by pointing out those weaknesses which were the result of his own lack of diligence, competence, or inventiveness in preparing his proposal."

We think this principle is equally applicable to the determination of the content and extent of discussions concerning technically acceptable proposals. In this case, competition was assured by two acceptable proposals within the competitive range and the danger of technical levelling through detailed discussions was real. Under these circumstances, we think the agency was justified in limiting its discussions to those areas in which it needed clarifications.

WSP also contends that a lack of objective standards to which evaluators are instructed to adhere necessarily results in capricious and unfair evaluations. We assume that the protester does not consider the evaluation criteria set out in the solicitation to be sufficiently definitive. The solicitation's evaluation weight factors are as follows:

"Evaluation Weight Factors: the technical proposal shall be evaluated according to the stated criteria using the weighting factors shown:

<u>CRITERIA</u>	<u>WEIGHT</u>
"1. Understanding of the Problem and Technical Approach:	40
a. Understanding of the major purposes, issues and problems posed by RFP (15)	
b. Level of knowledge and approach taken concerning review and analysis of existing training programs, resources, materials and literature concerning child abuse and neglect; and the approach to	

developing agency plans as required
in Task 1 (10)

c. Approach that will be used in
providing on-site technical assis-
tance to the designated agencies as
required in Task 2 (15)

"2. Corporate Experience: 20

Prior experience in the following
areas is essential:

- a. In organizations whose functions
relate to child development, child
welfare or protective services (4)
- b. At the state and local level (2)
- c. In rural and urban areas (2)
- d. In health, mental health education
and law-enforcement agencies (6)
- e. In designing and implementing
direct training programs for professional
service delivery staff (6)

"3. Qualifications of Offeror's Person- 40
nel

a. Indicate the candidates for each
salaried part-time or consultant position.
Each candidate's qualifications past
experience and availability, shall be
measured (20)

b. Measure the range of professional
skills to implement this contract (should
include at a minimum):

"1. Experience in designing and delivering
training plans for state and local agency
staff in urban and rural areas (4)

"2. Experience in designing and developing
practical documentation for use by and
guidance of state and local agencies inter-
ested in implementing training programs (2)

"3. Experience in pilot testing of training
design and evaluation (2)

"4. Experience in providing technical
assistance in design, overall planning
and implementation to state and local
agencies (2)

c. Indicate position descriptions for all pro-
fessional positions, including consultant and

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the number of workdays by task to be expended
by the project manager and each additional
staff member or consultant (10)"

A proposal evaluation must be conducted within the bounds of the solicitation and the regulations and a fair and reasonable result should be its goal. However, the negotiation process depends largely upon judgment, the effective exercise of which is not always susceptible to the constraints of nondiscretionary standards. While the judgments of the evaluators must be exercised fairly, dispassionately and in accordance with the announced criteria and subcriteria in determining the merits of the proposals, further constraints upon such judgments tend to defeat the purpose of procuring by negotiation. In any event, we consider the above quoted evaluation criteria to be sufficiently definitive to permit a fair evaluation.

WSP further contends that one of the evaluators improperly informed WSP of its standing with respect to its competitors during the evaluation. It claims to have been advised of the progress of the evaluation, its probable outcome and that HEW's target price for this procurement exceeded last year's contract price. Although WSP presents these allegations as irregularities, we note that it expressed no objections until after it discovered that it would not be awarded a contract. A protester cannot participate in an irregular course of action and then be heard to complain about it. Datawest Corporation, B-180919, January 13, 1975, 75-1 CPD 14.

Although the agency evaluator involved concedes that, during numerous conversations initiated by WSP, he informed WSP that more funds were budgeted for this procurement because of added work and had answered WSP's questions regarding status of the evaluation process, he denies revealing competitive standings, revealing probable outcome or that WSP was provided information which would have directly influenced price negotiations between WSP and the agency. WSP also suspects that Kirschner may have received even more information which influenced its decision to reduce its price when it submitted its best and final offer but we find nothing in the record to support this speculation. The record merely shows that WSP initiated inquiries with Government personnel and does not indicate that such discussions, if any, took place with others.

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WSP contends one of the evaluators predicted to others the outcome of the evaluations which, if known to WSP's competitors, would have influenced their offers. The evaluator states that during frequent meetings, he discussed with various state representatives the status of several procurements so that they could understand the delays in receiving technical assistance and that he expressed the hope that WSP would be continued as an indication of concern for continuity and the prompt provision of assistance to the states. An expression of hope by a technical evaluator is not factual advice as to which offeror has the better proposal or price. We question, however, the propriety of the evaluator expressing such a hope because it could be construed as a predisposition in the evaluation process. Therefore, we suggest that the Secretary, HEW, take action to insure such expressions of hope are avoided during the evaluation process in future procurements.

WSP also states that a WSP consultant whose biographical resume was submitted with Kirschner's proposal, has had continuing possession of WSP's "proposal materials, original proposal, plans, etc." The resume as submitted by Kirschner indicates that the consultant at that time was a consultant to WSP and two other organizations and the Kirschner proposal indicates an intention to use her as an advisor on child abuse if awarded the contract. The resume of this individual also was submitted by WSP. The WSP proposal does not include the consultant among the key members of the project. While not specifically alleging that its proprietary data was misappropriated, WSP states that the possibility of a "cross introduction" of WSP materials into the Kirschner proposal should be investigated. We have examined the record and are unable to conclude that the consultant assisted in preparation of either proposal other than apparently consenting to the use of her resume by both parties. Moreover, the matter essentially relates to a dispute between two private parties regarding proprietary rights which should not be resolved by this Office. Garrett Corporation, B-182991, B-182903, January 13, 1976, 76-1 CPD 20; Dillon Lumber Co., Inc., B-188631, April 8, 1977, 77-1 CPD 249.

Accordingly, this protest is denied.

Deputy

R. F. K... ..
Comptroller General
of the United States



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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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March 7, 1978

The Honorable Joseph A. Califano, Jr.
The Secretary of Health, Education &
Welfare

Dear Mr. Secretary:

Enclosed is a copy of our decision of today in which we denied the protest of the Washington School of Psychiatry concerning request for proposals No. ASD-7-77. We call you attention, however, to the suggestion therein that action be taken to preclude expressions of hope by proposal evaluators as to the results of the evaluations in future procurements.

Sincerely yours,

Deputy


Comptroller General
of the United States

Enclosure